U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 November 2006

BALCA Case No.: 2005-INA-00210
ETA Case No.: P2004-NY-02507701

In the Matter of:

POST ROAD BROADWAY, INC.,
Employer,

on behalf of

JOSEFINA PALACIOS,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Pablo E. Fernandez-Herrera, Esquire
White Plains, New York
For the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, Employer, Post Road Broadway, Inc., filed an application for labor certification to enable the Alien, Josefina Palacios, to fill the position of Manager. (AF 179). Employer required two years of experience in the job offered. Employer filed a Request for Reduction in Recruitment ("RIR"). (AF 204).

On October 15, 2004, Employer was notified that its request for RIR was partially reduced because it appeared that the placing of a job order and advertisement over the name of the Job Service Office could conceivably generate availability of U.S. workers. (AF 173). Employer was directed to place a ten day job order and a Sunday advertisement in a newspaper of general circulation.

Employer was provided the resumes/letters of ten U.S. applicants by the State of New York Department of Labor Alien Employment Certification Office, and was advised to contact each applicant within two weeks and take appropriate follow-up action. (AF 117). It was recommended to Employer that it keep a detailed record of all contacts and that contact by mail should be through certified mail.

Employer submitted its report of recruitment results on March 4, 2005. (AF 77). Employer contended that none of the ten candidates were qualified, able, willing or amenable to accepting the position offered.

On April 6, 2005, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 70). The CO found that five of the U.S. applicants were rejected for other than lawful, job-related reasons. Specifically, the CO found that Employer stated that it made attempts to contact these applicants by telephone to arrange appointment interviews without success, but provided no evidence of these attempts via telephone logs. Employer also provided no evidence of any attempts to contact these applicants in

writing. The CO pointed out that such an effort would have demonstrated that Employer had exhausted all avenues in his attempt to fill this position with a U.S. worker. To rebut, Employer was directed to furnish evidence of contact by telephone and mail and to further document specific, lawful job-related reasons why Employer could not offer the position to the U.S. applicants.

Counsel for Employer submitted rebuttal on April 25, 2005. (AF 54). Included were a letter of rebuttal from Employer and a telephone bill. In its rebuttal letter, Employer argued that every applicant was contacted and submitted its telephone bill showing telephone calls having been made to all applicants. According to Employer, each applicant was left a message on his or her respective answering machines and the applicants did not respond, showing a lack of interest in the job offer in question.

A Final Determination was issued on July 12, 2005. (AF 42). The CO found that Employer had documented attempts to contact the applicants by telephone, but failed to establish any attempts to contact these applicants by mail. Despite the NOF's request for same, no documentation of letters sent to the applicants was produced for four of the applicants.[2] Accordingly, the CO found that Employer had failed to satisfactorily document its rejection of the four able, willing, qualified and available applicants, and had not furnished all of the documentation requested in the NOF. The CO also raised new issues which she conceded were not raised in the NOF and therefore were not a basis for the denial.

On August 16, 2005, Employer filed a Request for Review. (AF 1). This matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board").

[2] Employer's rebuttal with regard to the rejection of one of the applicants was accepted by the CO, Employer having provided documentation of attempts to contact that applicant by telephone and mail.

DISCUSSION

In its Request for Review, Employer argues that it provided proper documentation to substantiate its rejection of the four applicants at issue. Employer contends that it was originally requested to furnish evidence of contact by telephone or mail, not both. According to Employer, it did not initiate mail contact with the applicants because it was following the instructions from the New York Department of Labor which did not require contact by both telephone and mail, but by either telephone or mail. Employer contends that because it relied upon the state's instructions, it should not be penalized by a denial of this labor certification. Employer further argues that the applicants in question failed to respond to the telephone messages left, and therefore, it is error for the CO to conclude that these applicants were able, willing, and qualified. Finally, Employer contends that even if the four applicants had returned the telephone calls, it would have deemed these applicants rejected on the basis of their qualifications.

Employer's last argument was not raised below and will not be considered herein.[3] Indeed, at best, it raises further doubt as to the credibility of Employer's recruitment efforts. The controlling factor, however, is that this Board's review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §656.27(c); *see also* 20 C.F.R. §656.24(b)(4). Evidence and argument first submitted with the request for review will not be considered by the Board. This is "an expression of the importance for labor certification matters to be timely developed before certifying officers who have the resources to best determine the facts surrounding the application." *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*).

[3] Also raised for the first time is the claim that Employer made more than one attempt to contact these applicants by telephone, Employer now asserting it made three telephone calls to three of the applicants and at least two telephone calls to a fourth applicant. Were this new evidence to be considered, it would only raise more questions about Employer's credibility, given that this claim was not previously raised and that the telephone bills do not substantiate the additional telephone calls alleged.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Exxon Chemical Company*, 1987-INA-615 (July 18, 1988) (*en banc*). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc., supra.*

In *Bay Area Women's Resource* Center, 1988-INA-379 (May 26, 1989) (*en banc*), it was held that where an employer only attempted to contact a U.S. applicant at one of three possible telephone numbers and no attempt was made to contact her by mail, the employer's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. The instant case is no different. While Employer claims the letters from the State of New York Department of Labor Alien Certification Office gave Employer the option of contact by telephone or mail, and did not require both, this does not appear to be the case. Thus, the correspondence from that office does not suggest that an employer limit its efforts to one mode of contact, and specifically indicates that an employer should submit proof of contact by telephone calls, copies of certified mail and copies of e-mails sent to applicants. (AF 23). Indeed, that Employer knew to attempt more than one method of contact is apparent in its attempts to contact the one U.S. applicant by telephone and by mail, the rejection of that applicant having been accepted by the CO. This Board finds that Employer was provided adequate notice that alternate means of contact would be required. *See PJM Bookkeeping & Tax Services*, 2002-INA-66 (Oct. 3, 2002).

With regard to the four U.S. applicants at issue, Employer made only one attempt at telephone contact. It was incumbent upon Employer, upon receiving no response to its telephone messages, to attempt other means of contact, such as a letter. Employer made no such efforts and has demonstrated less than a good faith effort to contact these four qualified U.S. applicants. Labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.